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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 87

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

v.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Opinions Below.

The opinion of the Supreme Court of Indiana (R., 277) has not yet been officially reported, but will be found in 163 N. E. Rep. 99. Previous opinions in the case will be found in 192 Ind. 199 and 263 U. S. 540.

Jurisdiction.

The judgment of the Supreme Court of Indiana was entered October 2, 1928 (R., 276). A petition for rehearing was filed on November 22, 1928, and denied March 15, 1929 (R., 287).

Petition for certiorari was filed May 13, 1929. Jurisdiction to issue the writ is conferred upon this Court by Section 237 (*b*) of the Act of February 13, 1925.

The Statutes Involved.

Section 6 of the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65, 66, as amended by the Act of April 5, 1910, Chapter 143, 36 Stat. 291 (U. S. C., Title 45, Section 56), provides:

> "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

Section 2 of the Act of April 5, 1910, *supra,* added to the Federal Employers' Liability Act a new section (U. S. C. Title 45, Sec. 59 which reads:

> "SECTION 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

The Question Presented.

Whether it was error in the trial court to permit the filing of an amended complaint by Carroll, administratrix, at the retrial of an action brought by Burtch, an employee, for injuries sustained in unloading an interstate shipment, such amended complaint setting up as an additional ground of damages the death of Burtch, as the result of such injuries, which occurred while the case was pending in an appellate court on appeal from a judgment in his favor, such amended complaint being filed more than two years after the occurrence of death but promptly after the remanding of the case for a new trial.

Statement.

This action was instituted in the Circuit Court of Jackson County, Indiana, February 20, 1918, by Guerney O. Burtch (since deceased) against the Railroad Company to recover damages for personal injuries suffered by him on October 24, 1917, as the result of the Railroad Company's negligence while he was engaged in assisting to unload a heavy ensilage cutter from a freight train at Commiskey, Indiana (R., 1).

On May 28, 1918, a verdict for $8,000 was rendered in favor of Burtch (R., 14), and judgment entered in accordance therewith on October 23, 1918 (R., 29).

The Railroad Company appealed to the Supreme Court of Indiana (R., 30), which, on March 14, 1922, affirmed the judgment (R., 33). *Baltimore, etc., R. Co.* v. *Burtch* (1922), 192 Ind. 199.

On February 10, 1921, while the case was pending on appeal in the Supreme Court of Indiana, the complainant Burtch died as the result of his injuries (R., 102).

On February 14, 1921, his widow, Lula Burtch (now Lula Carroll) was appointed administratrix (R., 103).

The Railroad Company petitioned for and obtained a writ of certiorari from this Court, and Lula Burtch was substituted for her deceased husband. This Court on January 7, 1924, held that the shipment involved was interstate commerce, reversed the judgment of the Supreme Court of Indiana and remanded the case for further proceedings not inconsistent with the opinion (R., 34); *B. & O. S. W. R. R. Co.* v. *Burtch,* 263 U. S. 540.

The cause having been remanded in accordance with the judgment and mandate of this Court to the Circuit Court of Jackson County, the respondent Lula Carroll, as administratrix of Burtch's estate, on or about March 5, 1924, filed an amended complaint in three paragraphs, each praying for damages for the injuries sustained by Burtch in his lifetime and by respondent, his administratrix, for herself and their two children by his death (R., 34). The third paragraph (R., 41-44), which was based on the Federal Employers' Liability Act, is the only one material here.

By various motions and pleadings the Railroad Company raised the question whether the claim for damages because of Burtch's death was barred by the two-year period of limitations prescribed in the Federal

Employers' Liability Act, its contention being that the filing of the amended complaint three years after Burtch's death constituted in reality the institution of a new suit.

The case went to trial and a verdict and judgment were rendered in favor of respondent for $15,000 (R., 102, 112). The judgment was affirmed by the Supreme Court of Indiana on October 2, 1928 (R., 276).

ARGUMENT.

I.

This is a second petition for certiorari in this case. It is submitted that the only question of substance presented is whether the statute of limitations has run so as to prevent recovery by the administratrix of damages for the death of Burtch.

The action for damages for injuries to him was brought by Burtch within four months after the accident by which he was injured. It came to trial and resulted in a judgment in his favor, which was affirmed by the Supreme Court of Indiana. Burtch died February 10, 1921, while the cause was pending in that court. On certiorari this Court reversed and remanded for a new trial, holding that the accident occurred in an interstate shipment and that the Federal Employers' Liability Act applied. When the case was remanded for a new trial the administratrix promptly filed an amended complaint setting up the death of Burtch. The question is whether the statute com-

menced to run at the death of Burtch and barred recovery of damages for his death.

It is submitted that the statute of limitations did not commence to run until the case was remanded to the trial court. The amended complaint could not be filed in the Supreme Court of Indiana nor in this Court. It could not be filed until the case got back in the trial court. *Impotentia excusat legem.* If the judgment of the trial court, affirmed by the Supreme Court of the State, had been affirmed by this Court, or if a petition for a writ of certiorari had been denied, of course there could not be any recovery under the statute of damages for the intervening death of Burtch. As, however, the case went back for a new trial, and as an additional element of damage had occurred while the case was pending in the appellate courts and since the former trial, it was proper to file the amended complaint setting up such additional element of damage, which was promptly done. Damages for injuries and for death "not only may be recovered by the personal representative of the deceased in one action, but *must* be recovered in one action only, if at all" (*No. Pac. Ry. Co.* v. *Maerkl,* 198 Fed. 1, 7).

> "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single

> wrong but a single recovery for a double wrong" [*St. Louis & Iron Mountain Ry.* v. *Craft,* 237 U. S. 648, 658].

As said by Mr. Justice Holmes in *New York Central R. R. Co.* v. *Kinney,* 260 U. S. 340, 346:

> "When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

II.

Petitioner further claims that suit having been brought for the injuries to Burtch, and judgment having been rendered therefor, recovery could not be had for the subsequent death of Burtch—that that presented a separate cause of action. We submit, however, that there was in this case in reality only one cause of action, that is, the wrongful act or neglect by reason of which Burtch was injured. At the time the suit was brought there was but one element of damage —for the injuries sustained by Burtch. When the case went back for a new trial the same cause of action existed, but an additional element of damage had intervened, in the death of Burtch. As the judgment for the injuries was set aside and a new trial directed, the situation was as though the suit had never been tried. There was no error, therefore, in the court permitting the filing of the amended complaint, and no error in submitting to the jury the two elements of damage. See *Louisville & N. R. Co.* v. *Echols* (S. Ct. Ala),

84 South. Rep. 827, the facts of which were strikingly similar to those in the present case.

III.

It is claimed also that there exists in the case the question of assumption of risk. We submit, however, that even if that question were in the case it is not appropriate for consideration by the Court on a petition for a writ of certiorari. It does not present a federal question. Doubtless if the case were under consideration by this Court on the merits, the question of assumption of risk might be weighed by it along with the other questions presented by the record.

It is submitted that a righteous verdict and judgment, in accordance with the applicable decisions of this Court, have resulted after litigation commenced more than eleven years ago, that no question is presented by the petition, or special and important reasons assigned, which would justify this Court in granting a second writ of certiorari, and that it should be denied.

Respectfully submitted,

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JULY, 1929.

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